No. 41689-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

LETRECIA NELSON,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

The Honorable Stephanie A. Arend (trial) and the Honorables Susan Serko, Ronald Culpepper and Vicki Hogan (motions), Judges

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OPENING BRIEF OF APPELLANT LETRECIA NELSON

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RULES, STATUTES AND CONSTITUTIONAL PROVISIONS

A. ASSIGNMENTS OF ERROR

1. There was insufficient evidence to prove all of the essential elements of the crime of possession of a stolen firearm.

2. The sentencing court erred in relying on aggravating factors which did not apply as a matter or law or fact and in imposing an exceptional sentence based upon those factors. Appellant assigns error to the court's "findings of fact" II which provides:

> The aggravating factors of "destructive and foreseeable impact" (RCW 9.94A.535(3)(r)) and "law enforcement victim" (RCW 9.94A.535(3)(v)) are applicable to both counts I and V. The evidence of these aggravating factors was presented to the jury who found these aggravating factors to exist beyond a reasonable doubt. The legislature did not consider these factors in determining the standard range.

CP 1627-28.

3. Remand for correction of the judgment and sentence is required, because the court failed to indicate its dismissal of multiple counts and that it imposed a sentence within the standard range for the firearm offense.

4. Pursuant to RAP 10.1(g), appellant Letrecia Nelson adopts and incorporates herein by reference the arguments of Eddie Davis and Douglas Davis, her codefendants on appeal.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Appellant Letrecia Nelson was home when her nephew, Maurice Clemmons, showed up at her door after shooting and killing four police officers in Lakewood, Washington. At some point during the approximately 15-30 minutes Clemmons was there, Nelson apparently put the gun into a bag which Clemmons was going to take.

Was this evidence of Nelson's passing control of the gun insufficient to prove actual possession under the law?

Further, was there "constructive" possession where the defendant was simply renting a home into which a person briefly and unexpectedly brought a stolen gun and the defendant only handled the gun once, in order to put it in a

bag so it could be removed from the house?

2. Nelson was found guilty of "rendering criminal assistance" for lying to police about whether she had seen Clemmons on the day of the shooting.

   Did the sentencing court err in imposing an exceptional sentence based upon the factor that the crime had a serious, foreseeable impact on others when that aggravating factor was based upon conduct which was necessarily considered by the Legislature in setting the presumptive range for the sentence? Further, did the sentencing court err in imposing the sentence based upon the impact of the crime on others when there was insufficient evidence that the impact was any greater than in the typical situation where a defendant renders criminal assistance to someone who has committed murder?

3. The sentencing court also relied on an aggravating factor which only applied if the victim of the crime was a law enforcement officer, the defendant knew the victim was an officer, and the officer was engaged in his or her official duties at the time of the crime.

   Did the court err in relying on this factor because the victim of the crime of rendering criminal assistance is the public at large?

4. Below, the court dismissed all but one of the counts of "rendering." It also ordered an exceptional sentence on the remaining "rendering" count but a sentence at the top of the standard range for the firearm possession offense. On the judgment and sentence, the section regarding dismissal of counts was left blank and someone wrote in that the court imposed a sentence above the standard range for both offenses. Should the case be remanded for correction of those scrivener's errors?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Letrecia Nelson was charged by information with six counts of first-degree rendering criminal assistance and one count of possession of a stolen firearm, with aggravating circumstances alleged for each count that the crime involved "a destructive and foreseeable impact

on persons other than the victim" and that it was committed against a law enforcement officer who was performing his or her official duties at the time and the offender knew of the victim's status. CP 805-809; RCW 9A.56.140(1), RCW 9A.56.310(1), RCW 9A.76.050(1), RCW 9A.76.070(2)(a), RCW 9.94A.545(3)(r), RCW 9.94A.535(3)(v). Pretrial proceedings were held before the Honorable Judges Vicki Hogan on January 7, 2010, and the Honorable Stephanie Arend on January 7 and 26, March 4, 17, 31, April 14, 20, 29 and May 7, 20210, the Honorable Susan Serko on June 7, 2010, and the Honorable Ronald Culpepper on June 30, 2010, and Judge Arend on July 14, August 5, September 7-9 and October 11-12, 2010, after which trial was held before Judge Arend on October 26 and 28, November 2-3, 8-10, 15-18, 22, 29 and 30, December 1-2 and 6, 2010.[1] All but one of the "rendering" counts was orally

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[1]There are 34 volumes of transcript, some containing multiple days. The volumes will be referred to as follows:

the volume containing both proceedings of January 7, 2010, as "1RP;"
January 26, 2010, as "2RP;"
March 4, 2010, as "3RP;"
March 17, 2010, as "4RP;"
March 31, 2010, as "5RP;"
April 14, 2010, as "6RP;"
April 20, 1010, as "7RP;"
April 29, 2010, as "8RP;"
May 7, 2010, as "9RP;"
June 7, 2010, as "10RP;"
June 25, 2010, as "11RP;"
June 30, 2010, as "12RP;"
July 14, 2010, as "13RP;"
August 5, 2010, as "14RP;"
September 7, 2010, as "15RP;"
the two chronologically paginated volumes containing the proceedings of September 8 and 9, 2010, as "16RP;"
October 11, 2010, as "17RP;"
October 12, 2010, as "18RP;"
October 26, 2010, as "19RP;"
the chronologically paginated volumes containing the proceedings of October 28, November 2-4, 8-10, 15-18, 22, 29 and 30, December 1-2 and 6, 2010, as "TRP;"
the proceedings of January 14, 2011, contained in the same volume as January

dismissed prior to the case going to the jury and Nelson was ultimately convicted of one count of rendering criminal assistance and one count of possession of a stolen firearm, both with the two charged aggravating factors. CP 1570-74.

Sentencing was held before Judge Arend on January 14 and 19, 2011, after which the judge imposed an exceptional sentence above the standard range for the rendering conviction and a sentence at the top of the standard range for the stolen firearm conviction, with the terms to run consecutive. CP 1629-41. Nelson appealed and this pleading follows. See CP 1646-55.

2. Testimony at trial

In their sections about the trial testimony and in Eddie Davis' summary of the case, the opening briefs of codefendants Douglas Davis and Eddie Davis set forth most of the relevant facts regarding the crimes of Maurice Clemmons, the subsequent investigation and the allegations against Douglas and Eddie.[2] Opening Brief of Douglas Davis (hereinafter "DD Brief"), at 4-10; Opening brief of Eddie Lee Davis (hereinafter "ED Brief"), at 1, 6-13. Pursuant to RAP 10.1(g), and in the interests of avoiding duplicative pleadings, those facts are incorporated and adopted herein by reference.

Nelson does not, however, adopt the codefendants' statements of

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19, 2011, but separately paginated, as "SRP;"
the proceedings of January 19, 2011, contained in the same volume as January 14, 2011, but separately paginated, as "SRP2."

[2]Because they share the same last name, for clarity Douglas and Eddie Davis will be referred to by their first names herein, with no disrespect intended.

the facts relevant to her involvement in the events. Instead, she presents the following statement of those facts as well as other facts relevant to her arguments on review:

When Maurice Clemmons engaged in his "rant" about shooting officers and white kids on Thanksgiving, it was nothing new. TRP 329-30. People close to Maurice had been hearing him talk about being on a mission and saying such things about police and white kids and things for awhile. TRP 329-30. In fact, Clemmons engaged in this kind of rant quite often, and nothing had ever come of it before. TRP 329-30.

On the day of the shooting, Cecily Clemmons[3] heard knocking on the door and window and then heard Clemmons say something about needing a shirt and having just killed four police officers. TRP 307. A moment later, Cecily's mom, Letrecia Nelson, came into the room where Cecily was lying on the bed. TRP 309. Nelson said Clemmons was asking to use Cecily's car. TRP 309. Cecily then got out of bed and went into the living room, asking Clemmons what had happened. TP 309. After he explained, Cecily not only gave him car keys but also gave him $60 cash. TRP 311-13.

Cecily admitted that, when Letrecia Nelson came into Cecily's room that day, Nelson was shaking and appeared scared. TRP 381. Cecily also admitted that, in general, Nelson was actually quite a strong, opinionated person who is "not quiet" but Nelson was not acting that way, instead just doing what Clemmons demanded. TRP 381-82. Cecily saw

[3]Because she shares the same last name as Maurice Clemmons, for clarity Cicely Clemmons will be referred to by her first name herein, with no disrespect intended.

no wound on Clemmons and did not see who had gotten clothes for Clemmons, although if it had been Nelson, Cecily would have heard the sound of the drawers based on the proximity of the rooms. TRP 382.

When Cecily came out of the room to ask Clemmons what had happened, Nelson was in the kitchen. TRP 383-84. Neslon was still shaking and obviously scared. TRP 384.

Indeed, Cecily said, it was unusual to see her mom so quiet and scared and have her not ordering people around. TRP 384-86. Even after Clemmons left, Nelson was still shaking and seemed "scared to death." TRP 388.

When she spoke to police the day of the shootings, Nelson told them not only that she did not know where Clemmons was and had not seen him but also that, if she knew, she probably would not tell them. TRP 502-503. Ultimately, after Clemmons was shot and killed by a police officer, Nelson told them about Clemmons showing up with the gun that day and said she had grabbed a bag for him to carry his stuff in and put the gun inside.

In all, Maurice Clemmons was at Nelson's home for a scant 15-30 minutes. Aside from that brief time, Nelson had no other involvement with the circumstances ultimately resulting in Clemmons' death.

The jury acquitted Nelson of all of the different "means" of alleged "rendering criminal assistance" such as "harboring or concealing" Clemmons and destroying physical evidence by cleaning up a bloodstain in her home, finding Nelson guilty only for "preventing or obstructing, by use of force, deception, or threat, anyone from performing an act that might aid

in the discovery or apprehension of Maurice Clemmons." CP 1574.

D. ARGUMENT

1. THE CONVICTION FOR POSSESSION OF A STOLEN FIREARM MUST BE REVERSED, BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO PROVE MORE THAN PASSING CONTROL

Under the state and federal due process clauses, the prosecution bears the burden of proving every essential element of a crime, beyond a reasonable doubt. See In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Cleveland, 58 Wn. App. 634, 648, 794 P.2d 546, review denied, 115 Wn.2d 1029 (1990), cert. denied, 499 U.S. 948 (1991). Where the state fails in this duty, reversal and dismissal with prejudice is required. See State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980), overruled in part and on other grounds by Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed.2d 466 (2006).

In this case, this Court should reverse and dismiss Nelson's conviction for possession of a stolen firearm with prejudice, because the prosecution failed to prove all of the essential elements of that crime, beyond a reasonable doubt.

a. Relevant facts

The prosecution's theory of Nelson's guilt for possession of the stolen firearm was that she had "dominion and control" over the gun Clemmons had when Clemmons brought it into the home after stealing it and using it to tragic effect. TRP 1708. Indeed, the prosecutor argued that everyone in the room when Clemmons was there knew the firearm had been stolen by Clemmons and had at least "constructive" possession simply

by virtue of being in the same room with it. TRP 1706-1709. Nelson was guilty, the prosecutor argued, because it was assumed that she got out a "Tommy Hilfiger" bag for Clemmons and had put the gun in that bag so that Clemmons would take it along with all of his other things when he left. TRP 1709.

In rebuttal closing argument, the prosecutor said there was "actual possession" when Nelson picked up the gun and that there was proof of an "intent to deprive the owner" of the gun because "the owner stopped by, maybe not Lakewood PD, but law enforcement stopped by" and Nelson said "I don't know anything." TRP 1891.

b. The evidence was insufficient to establish more than fleeting possession

This Court should reverse and dismiss Nelson's conviction for possession of a stolen firearm, because the prosecution failed to present sufficient evidence of either actual or constructive possession. Pursuant to RAP 10.1(g), Nelson adopts and incorporates herein by reference the codefendants' arguments regarding the prosecution's burden of proof for a gun possession crime. See ED Brief at 13-20; DD Brief at 13-20. In addition, she presents the following:

The evidence in this case was insufficient to prove that Nelson had either actual or constructive possession of the gun Clemmons had stolen and brought to the house. Instead, at most, Nelson had the gun in her hand at her home for a few seconds while she put it in the bag.

That is insufficient to establish either actual or constructive possession. Where a defendant has only passing or fleeting possession, that

is not "actual control." State v. Callahan, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). As the Callahan Court made very clear, actual possession of contraband does not exist every time someone handles an item. 77 Wn.2d at 29. Instead, "possession entails **actual control**, not a passing control which is only momentary handling." 77 Wn.2d at 29 (emphasis added).

Nor was there evidence of "constructive possession." The doctrine of "constructive possession" is intended to avoid the absurd result that someone who truly possesses contraband but is not physically touching it at the time police arrive might not be convicted of that possession due to the happenstance of not being in actual contact with it at the relevant time. See, e.g., State v. Spruell, 57 Wn. App. 383, 387, 788 P.2d 21 (1990). As a result, the doctrine allows for conviction when, based upon the totality of the circumstances, the defendant is shown to have had "dominion and control" over the contraband, sufficient to establish possession which is deemed "constructive." See id.

But the mere fact that someone rents a home does not mean that they are in constructive possession of - and thus criminally liable for - anything someone brings into that home. See State v. Roberts, 80 Wn. App. 342, 353, 908 P.2d 892 (1996). Instead, the fact that contraband is found in someone's home is simply one factor in determining whether "dominion and control" over the home indicates "dominion and control" over the item. Id.

Put another way, "it is not a crime to have dominion and control over the premises where" contraband is found. See State v. Tadeo-Marew,

86 Wn. App. 813, 817, 939 P.2d 220 (1997). Instead, while it raises a presumption of possession, the Court looks at all of the relevant facts - the "totality of circumstances" - to determine if the defendant had "dominion and control" over the relevant item. Id.

Here, of course, the gun was not found in Nelson's home. Instead, it was there for a few minutes - at the outside, half an hour. Thus, the basic premise of constructive possession - to avoid a legalistic defense of no "actual" possession of an item found in a home - does not apply.

Further, aside from the few moments when she put it in a bag, there is no evidence that Nelson had "constructive possession" or "dominion or control" over that gun. She was certainly not able to exclude Clemmons from the gun, which he stole and used and then carried in the home with the intent of taking it with him when he left.

Put simply, this is not a case where, for example, the defendant lived in the basement in which the item was found, knew about it and handled it while it was there but denied it belonged to him, so that possession should be imputed based upon presence of the item, the defendant's access to it and his ability to control it. See State v. Summers, 107 Wn. App. 373, 389, 28 P.2d 780 (2002). This was a case where a family member came over unexpected and uninvited after committing heinous crimes, carrying a stolen gun. Nelson did not "possess" the gun - she simply put it in a bag for Clemmons so that he would take it with him.

Notably, the jury itself had questions about the scope of liability a person has when someone who comes over to their home or place where they are and brings a stolen gun. The jury specifically asked, "[d]oes being

in the same room with an item equate to the immediate ability to take that item?" TRP 1910.

Indeed, allowing a conviction for possession of the firearm Clemmons brought with him under these circumstances would radically change the law. Suddenly, any time anyone brought any contraband into a home for even a fleeting time, the person who owns the home would be criminally liable. That kind of expansion of the law of possession is not proper, despite the understandably strong emotions surrounding this case. This Court should so hold and should reverse and dismiss Nelson's conviction for "possession" of that which she did not possess.

2. THE SENTENCING COURT ERRED IN IMPOSING AN EXCEPTIONAL SENTENCE, BECAUSE THE AGGRAVATING FACTORS DID NOT APPLY AS A MATTER OF LAW OR FACT

Reversal and remand for resentencing within the standard range is also required for the conviction of rendering criminal assistance, because the aggravating factors upon which the lower court relied do not support the exceptional sentence as a matter of fact or law.

Pursuant to RAP 10.1(g), Nelson adopts and incorporates by reference herein the arguments of Eddie Davis and Douglas Davis challenging the propriety and application of the aggravating factors to the relevant crimes. See ED Brief at 20-34; DD Brief at 19-22.

In addition, she submits the following:

a. Relevant facts

Initially, Nelson was charged with multiple counts of rendering criminal assistance for all the various acts the prosecution claimed Nelson

had committed during the 15-30 minutes Clemmons was at her home after he committed his crimes. See CP 805-809. After the trial court granted Nelson's motion to dismiss all but one count and after much wrangling about how that affected the jury instructions, the court decided the way to present the case to the jury was as separate "means" of committing the crime. See CP 1574. In closing argument, the prosecutor argued that Nelson was guilty of rendering criminal assistance for all of those different "means:"

> for allowing Maurice Clemmons into her home, harboring him, for providing peroxide or medical aid which would allow them to avoid capture, and giving Maurice Clemmons clean clothes, which is essentially the same as a disguise. . . and that she cleaned up the blood which is destruction of evidence; finally, that she gave Cicely's car to Eddie Davis so that he could transport Maurice Clemmons out which is a form of transportation.

TRP 1696. The prosecutor also argued under what it called the "deception prong" of "rendering" that Nelson was guilty for having initially told police she knew nothing about the incident and had not seen Clemmons since Thanksgiving, even though she had. TRP 1700-1701. According to the prosecutor, "[t]hese details would have been imperative to law enforcement in their efforts to apprehend Maurice Clemmons." TRP 1697.

The jury disagreed with the prosecutor, acquitting Nelson of all of the different "means" alleged (i.e. harboring, concealing, providing with means to avoid apprehension, concealing/destroying physical evidence, etc.) except for the "deception" means (i.e., "preventing or obstructing, by use of force, deception, or threat, anyone from performing an act that might aid in the discovery or apprehension of Maurice Clemmons"). CP 1574.

At sentencing, for the gun possession offense, the court imposed a sentence at the top of the standard range; 14 months in custody. SRP 66; CP 1636-38. In addition, the court imposed an exceptional sentence for the "rendering conviction," ordering Nelson to serve 60 months for that offense even though the presumptive sentence was 12-14 months, and ordering that sentence to run consecutive with the sentence for the possession offense. SRP 66; CP 1636-38. The court relied on two aggravating factors; "that the offense involved a destructive and foreseeable impact" on someone other than the victim under RCW 9.94A.535(3)(r) and "law enforcement victim" under RCW 9.94A.535(3)(v). SRP 66; CP 1626-28. Before and during trial, Nelson and the others had moved to dismiss both of those aggravating factors. See, e.g., CP 865-66, 873-74, 1153-59, 1452-60; 8RP 33, 71; TRP 1315-23, TRP 1358.

In ruling on the issue, the trial court first said that the scope of the aggravating factor of a "destructive and foreseeable impact" on someone other than the victim was unclear under the law. TRP 1324-25. Nevertheless, the court held, it was "fundamentally impossible" to separate out the impact of the "rendering" conduct from the specific crimes that Clemmons - not Nelson or the others - had committed. TRP 1324-25. The judge also said that the case would have been different if the murders were not of people who had "status in the community" or if it had only been one person, but because of the "community outrage" about Clemmons' acts, Nelson was subject to the aggravating factor. TRP 1326. The court later entered written findings of fact and conclusions of law in support of the exceptional sentence, finding that the aggravating factors applied to both

crimes, noting that the jury had entered verdicts on those factors, and declaring, "[t]he legislature did not consider these factors in determining the standard range." CP 1628.

ii. Neither factor applied as a matter of law or fact

The court erred in imposing an exceptional sentence, because the aggravating factors did not apply as a matter of law or fact.

At the outset, the court appears to have entered an exceptional sentence solely on the "rendering" charge, as the 14 months imposed was within the standard range for the firearm offense. SRP 66. In addition, it is Nelson's position that her conviction for "possession" of the stolen firearm Clemmons brought to her house for 15-30 minutes must be reversed as unsupported by the facts and the law, as argued *infra*.

But in any event, the same aggravating factors were relied on by the sentencing court in imposing sentences on the firearm enhancements in the codefendant cases, and the irrelevance and impropriety of the application of those factors to the firearm charges is discussed in detail in codefendants' pleadings and, as noted, *infra*, incorporated herein pursuant to RAP 10.1(g).

The factors upon which the court relied also did not support the sentence for Nelson's "rendering" conviction. In addition to the reasons set forth by codefendants on appeal, with Nelson has adopted, *infra*, the aggravating factor of "foreseeable and destructive impact" did not apply to Nelson's crimes. First, that factor is based upon facts which were considered by the Legislature in determining the presumptive range for Nelson's offense. An exceptional sentence must be based upon aggravating

factors which are unique to the underlying crime in the particular case, not which inhere in or are common as part of the commission of the charged crime. State v. Nordby, 106 Wn.2d 514, 518, 723 P.2d 1117 (1986); see State v. Chadderton, 119 Wn.2d 390, 832 P.2d 481 (1992). Put another way, the reasons for an exceptional sentence "must take into account factors other than those which are necessarily considered in computing the presumptive range for the offense," when the Legislature established the standard range. Nordby, 106 Wn.2d at 518.

Thus, where a defendant was found guilty of vehicular assault, the severity of the injuries could not serve as an aggravating factor even though the victim was in the hospital for several months. State v. Cardenas, 129 Wn.2d 1, 14, 914 P.2d 57 (1996). In reaching this conclusion, the Supreme Court noted that the crime of vehicular assault requires "serious bodily injury" which involves "a substantial risk of death, serious permanent disfigurement, or protracted loss or impairment of the function of any part or organ of the body. Id. As a result, the Court held, even severe injuries were "evidently the type of injuries envisioned by the Legislature in setting the standard range," so that the severity of the injuries could not support an exceptional sentence. 129 Wn.2d at 7.

Further, the fact that there was more than one injury from the same incident was not sufficient. 129 Wn.2d at 9. Because "the very nature of a vehicular assault is that it often results in multiple injuries from this single act," the multiple injuries inflicted by the defendant's drunk driving in Cardenas "did not distinguish the crime from the typical vehicular assault" and so could not justify the exceptional sentence. 129 Wn.2d 9.

Similarly, here, the "foreseeable and destructive impact" upon which the court relied as an aggravating factor was inapplicable in this case, not only because the victim of the crime was the "public," as argued in codefendants' briefing. See DD Brief at 20; ED Brief at 23-34. In addition, the very nature of the crime of rendering criminal assistance is such that the "foreseeable and destructive impact" aggravating factor could not apply, because the impact in this case is exactly the kind contemplated in the commission of the crime itself. The crime of rendering criminal assistance requires that the defendant must know that the person she is assisting has committed a crime and "**is being sought by law enforcement for the same**." See State v. Anderson, 63 Wn. App. 257, 818 P.2d 40 (1991), review denied, 118 Wn.2d 1021 (1992) (emphasis added); see RCW 9A.76.070(1). Further, the mental state element of the crime of rendering is that the defendant have the intent to "**prevent, hinder, or delay the apprehension or prosecution** of another person he knows has committed a crime." RCW 9A.76.050 (emphasis added).

Thus, by definition, when someone commits the crime of rendering, they cause delay and difficulty in the apprehension or prosecution of the perpetrator of a crime. That is, in fact, the entire purpose for which the crime exists - to render criminal the causing of such hindrance or delay.

Further here, the crime for which Nelson was convicted was anticipating that the person to whom assistance was given had committed a serious crime, including, specifically, murder. RCW 9A.76.070(1). As a result, at the time the Legislature crafted the standard range, presumptive

sentence for this crime, they were contemplating that the defendant would have aided someone in the most heinous and serious of crimes. Because the crime of rendering necessarily contemplates that the defendant's acts will have caused delay in apprehension or prosecution of a person who has committed the crime, the effects of such delay were already included as part of the Legislature's calculation of the proper sentence for the crime - in this case 12-14 months in custody.

Notably, the trial court did not make any finding that Nelson's failure to tell the police she had seen Clemmons had some specific, unusual effect of delaying or causing problems, as opposed to the usual case where the defendant helps delay or hinder capture or prosecution of someone who commits murder. And the fact that, by refusing to tell police the truth, Nelson prevented them from apprehending Clemmons sooner is exactly the very kind of delay in apprehension considered by the legislature in setting the standard range.

Similarly, the "law enforcement involvement" aggravating factor did not apply, as a matter of law or fact. That aggravating factor is set forth in RCW 9.94A.535(3)(v) , which provides that the factor applies when

> [t]he offense was committed against a law enforcement officer who was performing his or her official duties at the time of the offense, the offender knew that the victim was a law enforcement officer, and the victim's status as a law enforcement officer is not an element of the offense.

In arguing that this factor had been proven, the prosecutor argued that the victim of "rendering criminal assistance" was "law enforcement," and "[t]hese law enforcement officer were trying to capture him [Clemmons], so they were victims of the offense" because they had to expend that effort.

TRP 1712-13. The prosecutor also argued that the murders had "deep impact" on the community, noting that Nelson had rendered criminal assistance to someone "who killed the police" and, as a result, there was a "manhunt that went on for days" which had an impact on the community. TRP 1713.

By its plain terms, however, the aggravating factor only applies if the victim of the crime the defendant committed was a law enforcement officer, performing official duties, and the defendant knew of the victim's status. RCW 9.94A.535(3)(v). But the victim of Nelson's crime of rendering criminal assistance was not a law enforcement officer. The victim of rendering criminal assistance is not the person who was the victim of the crime which Clemmons had committed but rather the public at large, whose interests in seeing criminals apprehended and prosecuted are offended by Nelson having assisted another who had committed a crime in a way which delayed apprehension. In this way, rendering criminal assistance, sometimes called being "an accessory after the fact," is akin to obstruction of justice, a crime for which it is the public interest which is harmed, not a particular person. See United States v. Balano, 618 F.2d 624 (10th Cir., 1980), overruled in part and on other grounds by Richardson v. United States, 468 U.S. 317, 325-26, 104 S. Ct. 3081, 82 L. Ed.2d 242 (1984) ("accessories after the fact '(obstruct) justice by rendering assistance to hinder or prevent the arrest of the offender after he has committed the crime'").

Put simply, the victim of the "rendering" was not the law enforcement officers who were required to do their jobs on overtime and set

aside other work to search for Clemmons - it was the public in general. The "law enforcement victim" aggravating factor did not apply, and this Court should so hold.

3. THE CASE SHOULD BE REMANDED FOR CORRECTION OF THE SCRIVENER'S ERROR REGARDING THE DISMISSAL OF ALL BUT ONE OF THE COUNTS CHARGING RENDERING CRIMINAL ASSISTANCE AND REGARDING THE SENTENCE

The trial court heard the defendants' motion to dismiss all but one of the charges of rendering criminal assistance per defendant and found that there was one "unit of prosecution" for the "rendering" crime and the state could not, therefore, proceed to trial on different counts for each alternative means of commission of the crime. TRP 1377; CP 850-51, 873-74. The court did not, however, so indicate in the relevant portion of the judgment and sentence. See CP 1629-41. This Court should remand with instructions to the trial court to correct this error, as well as another scrivener's error on Nelson's judgment and sentence.

First, the case should be remanded with instructions for the trial court to correct the error of failing to write the dismissed counts on the judgment and sentence where such information is to be set forth. See CP 1632-34. Pursuant to RAP 10.1(g), Nelson adopts and incorporates by reference herein the arguments of Eddie and Douglas Davis in their respective opening briefs. ED Brief at 34-38; DD Brief at 21-22.

Further, Nelson submits that, while due process does not mandate that a trial court always use written decisions in all circumstances and while oral rulings are certainly lawful, the Supreme Court has indicated a strong preference for written decisions, especially in circumstances where an

appellate court might need to be enlightened as to the trial court's reasoning. See, e.g., State v. Dahl, 139 Wn.2d 678, 688, 990 P.2d 396 (1999).

It is clear from the record that the trial court provisionally dismissed all but one of the multiplicity of counts charged for every act Nelson allegedly committed during the 15-30 minutes Clemmons was at the home and then lying to the police about having helped him. See TRP 1600; CP 873-74, CP 1573 (allowing only one count but submitting alternate means). The court waited, however, to formally dismiss, holding that, while the state could not go forward on all the counts at the time, it was theoretically possible for the state to prove more than one distinct incident of rendering criminal assistance, so that more than one count might remain. See TRP 1481, 1497, 1501-1508, 1600; CP 873-74. Ultimately, the court only allowed one count to go forward. See TRP 1493.

The trial court's judgment and sentence does not properly reflect the court's order. And indeed, it does not properly reflect the jury's verdict, either. The jury acquitted Nelson of all of the "means" which had originally been charged. See CP 1574.

The trial court's judgment and sentence also did not properly reflect the court's order not only in this way but also because of another scrivener's error. A "check-the-box" section on the form which indicates whether a sentence is above the standard range indicates that an exceptional sentence was imposed, but someone wrote in that such a sentence was imposed on both counts for which Nelson was sentenced. See CP 1633. In fact, the court chose to order a sentence above the standard range for the

rendering count but did not exceed the standard range for the firearm count. See SRP 66.

Even if this Court were to affirm the conviction for the stolen firearm, reversal and remand for resentencing would be required, both to properly reflect the dismissal of all but one of the "rendering" counts based upon the court's ruling on the unit of prosecution and to reflect that the court departed from the standard range only on the rendering conviction.

E. CONCLUSION

For the reasons stated herein, this Court should grant Ms. Nelson the relief to which she is entitled.

DATED this 7th day of December, 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel by efiling through this Court's system this date, to counsel for codefendant Davis (Stephanie Cunningham) through efiling this date, to counsel for codefendant Davis (2) (Jennifer Winkler) through efiling this date and by first-class mail, postage prepaid, to Letrecia Nelson, DOC 346425, WCCW, 9601 Bujacich Rd. NW, Gig Harbor, WA. 98332-8300.

DATED this 7th day of December, 2011.

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